

2017

**The State of Utah, Plaintiff/Appellee v. Travis Scott Murray,
Defendant/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

TRAVIS SCOTT MURRAY,
Defendant/Appellant.

Appellant is not incarcerated

BRIEF OF APPELLANT

An appeal from an order revoking and reinstating probation for Driving Under the Influence of Alcohol/Drugs, a third degree felony, in violation of Utah Code 41-6a-503(2)(b), in the Third District Court, Salt Lake County, State of Utah, the Honorable Ann Boyden presiding.

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FILED
UTAH APPELLATE COURTS

JUL 28 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
JURISDICTIONAL STATEMENT	1
ISSUE, STANDARD OF REVIEW, AND PRESERVATION.....	2
RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS.....	3
STATEMENT OF THE CASE AND FACTS.....	3
SUMMARY OF ARGUMENT	7
ARGUMENT	7
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	11
CERTIFICATE OF DELIVERY.....	12
Addendum A: Post Sentencing Judgment/Commitment	
Addendum B: Relevant Statutes, Rules, and Constitutional Provisions	

TABLE OF AUTHORITIES

Cases

<i>State v. Brooks</i> , 2012 UT App 34, 271 P.3d 831	7
<i>State v. Cox</i> , 2012 UT App 234, 286 P.3d 15	10
<i>State v. Dean</i> , 2004 UT 63, 95 P.3d 276	10
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993)	3, 9
<i>State v. Eldredge</i> , 773 P.2d 29 (Utah 1989)	9
<i>State v. Holgate</i> , 2000 UT 74, 10 P.3d 346	3, 9
<i>State v. Jameson</i> , 800 P.2d 798 (Utah 1990)	2
<i>State v. Lee</i> , 2006 UT 5, 128 P.3d 1179	10
<i>State v. Moreau</i> , 2011 UT App 109, 255 P.3d 689	2
<i>State v. Rhodes</i> , 818 P.2d 1048 (Utah Ct. App. 1991)	2, 7, 8, 10
<i>State v. Valdez</i> , 2016 UT App 74, 372 P.3d 85	9
<i>State v. Vazquez</i> , 2014 UT App 159, 330 P.3d 760	2, 7

Statutes

Utah Code § 41-6a-503	1, 3
Utah Code § 77-18-1	3, 7
Utah Code § 78A-4-103	1

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
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v.

TRAVIS SCOTT MURRAY,
Defendant/Appellant.

Appellant is not incarcerated

BRIEF OF APPELLANT

INTRODUCTION

Murray appeals from the trial court's order revoking and reinstating Murray's probation, and sentencing him to 180 days in jail. The trial court's sentencing decision was made following a probation hearing where Murray admitted violating certain conditions of his probation. Murray argues that the trial court's sentencing decision was an abuse of discretion. Murray respectfully asks this Court to reverse the trial court's order revoking and reinstating his probation with a jail sentence. He requests that his case be remanded for resentencing.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code §78A-4-103(2)(e). *See* Addendum A (Post Sentencing Judgment/Commitment).

ISSUE, STANDARD OF REVIEW, AND PRESERVATION

Issue: Whether the trial court abused its discretion when it revoked and reinstated Murray's probation and sentenced him to 180 days in jail.

Standard of Review: "The decision to grant, modify, or revoke probation is in the discretion of the trial court." *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). This Court "will reverse a probation decision only when it is 'clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion.'" *State v. Vazquez*, 2014 UT App 159, ¶7, 330 P.3d 760 (quoting *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah Ct. App. 1991)). The trial court's "exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court." *State v. Moreau*, 2011 UT App 109, ¶6, 255 P.3d 689 (alteration in original) (citation and internal quotation marks omitted).

Preservation: This issue was preserved by trial counsel's argument to allow Murray to continue on probation without revoking probation and imposing a jail sentence. *See* R. 102, 105-107.

To the extent this issue is not preserved, this Court should review it for plain error. "To demonstrate plain error, a defendant must establish that '(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more

favorable outcome for the appellant.” *State v. Holgate*, 2000 UT 74, ¶13, 10 P.3d 346 (quoting *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993)).

RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The following are provided in Addendum B: Utah Code §41-6a-503; Utah Code §77-18-1.

STATEMENT OF THE CASE AND FACTS

On January 27, 2014, Murray pleaded guilty to one count of Driving Under the Influence of Alcohol/Drugs, a third degree felony. *See* R. 40-42. On March 17, 2014, the trial court sentenced Murray to a suspended prison term not to exceed five years, 100 days jail, and a fine of \$2,876.70, and placed him on 36 months probation. R. 40-42.

On November 14, 2014, AP&P filed a probation violation report alleging that Murray missed some of his mandated testing appointments, but was “making progress” in treatment and other areas of his life. R. 52-55. Thus, AP&P recommended that the “situation be viewed as an Alternative Event.” R. 52-55. The trial court so ordered. R. 55.

Fifteen months later, on February 22, 2016, AP&P filed an affidavit in support of order to show cause, alleging that Murray violated the terms and conditions of probation by committing new crimes and infractions, and using controlled substances. R. 56-63. The allegations were as follows: (1) using controlled substances on January 8, 2016; (2) using a controlled substance on February 3, 2016; (3) committing the infraction of driving over gore area or

island on February 20, 2016; (4) committing the Class C Misdemeanor of ignition interlock violation on February 20, 2016; (5) committing the Class C Misdemeanor of driving on suspension on February 20, 2016; (6) committing the Class C Misdemeanor of operating vehicle without insurance on February 20, 2016; (7) committing the Class B Misdemeanor of use or possession of drug paraphernalia on February 20, 2016; and (8) committing the third degree felony of controlled substance schedule I or II on February 20, 2016. R. 56-58.

The trial court issued an arrest warrant on February 24, 2016. R. 67-69. On March 24, 2016, an updated affidavit was filed with two additional allegations: (9) failing to report as directed on February 23, 2016; and (10) leaving the state of Utah without prior written approval on March 22, 2016. R. 70-78.

The trial court appointed counsel, and set the matter for an order to show cause hearing on December 12, 2016. R. 83-84. At the December 12 hearing, Murray admitted allegations 1, 4, 6, and 9 as stated in the affidavit and order to show cause dated March 23, 2016, and denied the remaining allegations. R. 87-88; *see* R. 74-76. The state and AP&P recommended revocation of probation and one year in jail. R. 70-73, 104, 105.

Trial counsel advised the court that the defense disagreed with AP&P's recommendation. R. 102 ("We don't stipulate to the jail that will be requested by AP&P."). Trial counsel explained that Murray's violations arose from financial struggles and homelessness, and argued that Murray should not be revoked from probation. R. 105-107. Trial counsel argued that Murray "did well for a while" on

probation, “has [“shown”] the ability and the desire” to complete treatment, and “would very much like the opportunity to do treatment again, to do treatment and probation.” R. 106-107. Trial counsel emphasized that Murray valued substance abuse treatment and completed it while on probation. R. 106; *see* R. 71-22. Trial counsel explained that “[h]e was unable to pay the fine which I think is why his probation wasn’t closed out sooner but that’s not uncommon with a fine of close to \$3000.” R. 106-107. Trial counsel acknowledged that Murray relapsed after he became homeless for the first time in his life, which “he did not handle appropriately and [] that caused him to be in violation of his probation.” R. 105-107.

Additionally, trial counsel and Murray argued that Murray’s circumstances had improved and that his pro-social attitude would allow him to be successful on probation. R. 106, 108-109. For example, trial counsel explained that Murray “understands that what he did was not appropriate, that he needs to stay in the state,” and that Murray had “a place to live in [Utah] which he previously did not have.” R. 106. Murray told the trial court that he had “the will to remain sober and clean” and had “shown that for AP&P[] for the last three years by completing [treatment] courses.” R. 108. Murray said he lost his way after “not having a place to live” and “not being able to pay the fines.” R. 109. However, Murray “would like to get back on the right track and remain clean and get a job and be a productive member of society.” R. 109.

After hearing from the parties, the trial court stated “this is important information, Mr. Murray, but what you and your defense attorney are asking me to do is just kind of treat this [as] something different than it is.” R. 109-110. The trial court emphasized Murray’s history of DUI crimes and that Murray’s probation violations created a “dangerous situation to yourself, to your family and to the community as a whole.” R. 110. The trial court advised Murray that he should have gone to AP&P and asked for more treatment, rather than “just saying, ‘Well, I can blow it off and do it on my own.’” R. 110-111. The trial court continued, “what I take into consideration is[] that you have failed to comply with felony DUI probation.” R. 110. The trial court said that “[t]he fact that you have done what you have done, Mr. Murray, is the basis for my not imposing the prison sentence right now”, but “if you don’t succeed, I’m going to be imposing the original sentence as the sanction.” R. 110-111.

The trial court revoked Murray’s probation, reinstated probation for 12 months beginning December 12, 2016, and sentenced Murray to 180 days in jail. R. 87-88. The trial court further ordered that Murray “successfully complete the CATS Program in jail” and “may be released upon successful completion of the CATS Program.”¹ R. 111; R. 87-88. The remaining allegations were stricken. R. 87-88. Murray timely appeals. R. 89-94.

¹ Murray has completed his jail sentence. He is serving the revoked and reinstated probation term that is the subject of this appeal.

SUMMARY OF ARGUMENT

Murray argues that the trial court's decision to revoke and reinstate his probation and sentence to 180 days in jail was so inherently unfair as to constitute an abuse of discretion.

ARGUMENT

Murray argues that the trial court abused its discretion when it revoked and reinstated his probation and sentenced him to 180 days in jail. This Court “reviews the district court's decision to grant, modify or revoke probation for abuse of discretion.” *State v. Brooks*, 2012 UT App 34, ¶8, 271 P.3d 831. Because the “granting or withholding of probation involves considering intangibles of character, personality and attitude,” a district court has “complete discretion” with respect to its decision. *Rhodes*, 818 P.2d at 1049 (citations and internal quotation marks omitted). This Court “will reverse a probation decision only when it is ‘clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion.’” *Vazquez*, 2014 UT App 159, ¶7 (quoting *Rhodes*, 818 P.2d at 1051 (citations and internal quotation marks omitted)).

The Utah Code governs probation violation and revocation hearings. *See* Utah Code §77-18-1(12). A defendant's “[p]robation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.” Utah Code §77-18-1(12)(a)(ii). “At the hearing, the defendant shall admit or deny the allegations of the affidavit.” Utah Code §77-18-1(12)(d)(i). “Upon a finding that the defendant violated the conditions of probation, the court

may order the probation revoked, modified, continued, or reinstated for all or a portion of the original term of probation." Utah Code §77-18-1(12)(e)(ii) (emphasis added).

Murray maintains that the trial court's decision to revoke and reinstate his probation and sentence him to jail was "so inherently unfair as to constitute an abuse of discretion" because the trial court failed to weigh Murray's commitment to sobriety and history of treatment compliance while on probation. *Rhodes*, 818 P.2d at 1051 (citations and internal quotation marks omitted). For example, Murray accepted accountability for his behavior and recognized that his relapse resulted from his irresponsible reaction to "not having a place to live" and "not being able to pay the fines." R. 109. However, as Murray explained, he had "the will to remain sober and clean" and had "shown that for AP&P[] for the last three years by completing [treatment] courses." R. 108; R. 106; see R. 71. Indeed, AP&P confirmed that Murray completed treatment for his underlying DUI offense while on probation. R. 71-72. Additionally, the record suggests that Murray's inability to pay the "fine of close to \$3000" explains "why his probation wasn't closed out sooner." R. 106-107. Moreover, Murray's circumstances had improved by the time of the hearing, and he expressed his desire "to get back on the right track and remain clean and get a job and be a productive member of society." R. 109.

In light of Murray's commitment to sobriety and history of treatment compliance while on probation, Murray argues that "no reasonable [person] would take the view adopted by the trial court." *State v. Valdez*, 2016 UT App 74,

¶2, 372 P.3d 85 (alteration in original) (citation and internal quotation marks omitted). Instead, Murray contends that the trial court should have allowed him to complete probation without a revocation, jail sentence, or reinstatement of probation. R. 105-107; R. 107 (“[Murray] would very much like the opportunity to do treatment again, to do treatment and probation.”); see Utah Code §77-18-1(12)(e)(ii).

Plain error.

This issue is preserved by trial counsel’s argument to allow Murray to continue on probation without revoking and reinstating probation and imposing a jail sentence. R. 102, 105-107. To the extent this Court believes any aspect of Murray’s argument is not preserved, this Court should reverse for plain error. “To demonstrate plain error, a defendant must establish that ‘(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.’” *Holgate*, 2000 UT 74, ¶13 (alteration in original) (quoting *Dunn*, 850 P.2d at 1208-09).

First, the trial court’s decision to revoke and reinstate Murray’s probation and impose a jail sentence was erroneous. *See discussion supra*.

Second, the error should have been obvious. The “obviousness requirement poses no rigid and insurmountable barrier to review.” *State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah 1989), *cert. denied*, *Eldredge v. Utah*, 493 U.S. 814 (1989).

Murray need only “show that the law governing the error was clear at the time the

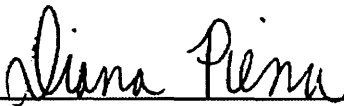
alleged error was made.” *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276. Indeed, Utah law is clear that a trial court’s sentencing decision may not be “so inherently unfair as to constitute an abuse of discretion.” *Rhodes*, 818 P.2d at 1051 (emphasis omitted) (citations and internal quotation marks omitted); see discussion *supra*. The inherent unfairness of the trial court’s sentencing decision should have been obvious because the sentence conflicted with the recommendations made by the state, AP&P, and trial counsel. For instance, the state and AP&P recommended that the trial court revoke Murray’s probation with a jail sentence. R. 70-73, 104-105. And trial counsel asked for Murray to continue on probation with no jail time. R. 105-107. Thus, the error of the trial court’s decision to revoke and reinstate probation with a jail sentence should have been obvious.

Third, as explained above, the error was prejudicial because there was “a reasonable likelihood of a more favorable outcome” “absent the error[s].” *State v. Cox*, 2012 UT App 234, ¶2, 286 P.3d 15 (quoting *State v. Lee*, 2006 UT 5, ¶26, 128 P.3d 1179); see discussion *supra*. Absent the trial court’s abuse of discretion, Murray would have continued on probation without serving a jail sentence and likely completed his probationary period earlier. See discussion *supra*. Thus, the trial court plainly erred in revoking and reinstating Murray’s probation with a jail sentence.

CONCLUSION

For the foregoing reasons, Murray respectfully asks this Court to reverse and remand the trial court's order revoking and reinstating probation, and remand for resentencing.

SUBMITTED this 28th day of July, 2017.



DIANA PIERSON

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,427 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.



DIANA PIERSON

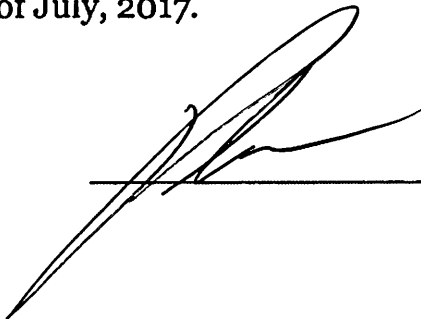
CERTIFICATE OF DELIVERY

I, DIANA PIERSON, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 28th day of July, 2017.



DIANA PIERSON

DELIVERED this 28th day of July, 2017.



Tab A

The Order of the Court is stated below:

Dated: December 12, 2016
02:05:48 PM

At the direction of:
/s/ ANN BOYDEN
District Court Judge
by
/s/ PATRICIA DEES
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	POST SENTENCING JUDGMENT/COMMITMENT
	:	
vs.	:	Case No: 131908284 FS
TRAVIS SCOTT MURRAY,	:	Judge: ANN BOYDEN
Defendant.	:	Date: December 12, 2016

PRESENT

Clerk: patd

Prosecutor: SUTTON, SAMUEL P

Defendant

Defendant's Attorney(s): DUNROE, SHARLA M

DEFENDANT INFORMATION

Date of birth: March 24, 1980

Sheriff Office#: 397103

Audio

Tape Number: S45 Tape Count: 1100-1118

CHARGES

1. DRIVING UNDER THE INFLUENCE OF ALCOHOL/DRUGS - 3rd Degree Felony

Plea: Not Guilty - Disposition: 01/27/2014 Guilty

SENTENCE, JUDGMENT and COMMITMENT

The defendant admits the following numbered allegations as stated in the Affidavit and Order to Show Cause: 1-4-6-9

The defendant denies the following numbered allegations as stated in the Affidavit and Order to Show Cause: Remaining

The defendant's probation is revoked.

The defendant's probation is reinstated for 12 months beginning 12/12/2016.

SENTENCE JAIL

Case No: 131908284 Date: Dec 12, 2016

Defendant is to serve 180 Days
Defendant is granted credit for time served.
Commitment is to begin immediately.

POST SENTENCE JAIL NOTE

Credit for Time Served From 11/22/2016. Early Release Upon Successfully Completion of
CATS Program
Remaining Allegations Stricken. Original Terms - AP&P. If Failure to Comply With AP&P,
Original Prison Sentence Imposed.

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

End Of Order - Signature at the Top of the First Page

Tab B

Utah Code § 41-6a-503

§ 41-6a-503. Penalties for driving under the influence violations

- (1) A person who violates for the first or second time Section 41-6a-502 is guilty of a:
 - (a) class B misdemeanor; or
 - (b) class A misdemeanor if the person:
 - (i) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;
 - (ii) had a passenger under 16 years of age in the vehicle at the time of the offense; or
 - (iii) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.
- (2) A person who violates Section 41-6a-502 is guilty of a third degree felony if:
 - (a) the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;
 - (b) the person has two or more prior convictions as defined in Subsection 41-6a-501(2), each of which is within 10 years of:
 - (i) the current conviction under Section 41-6a-502; or
 - (ii) the commission of the offense upon which the current conviction is based; or
 - (c) the conviction under Section 41-6a-502 is at any time after a conviction of:
 - (i) automobile homicide under Section 76-5-207 that is committed after July 1, 2001;
 - (ii) a felony violation of Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502 that is committed after July 1, 2001; or
 - (iii) any conviction described in Subsection (2)(c)(i) or (ii) which judgment of conviction is reduced under Section 76-3-402.
- (3) A person is guilty of a separate offense for each victim suffering bodily injury or serious bodily injury as a result of the person's violation of Section 41-6a-502 or death as a result of the person's violation of Section 76-5-207 whether or not the injuries arise from the same episode of driving.

Credits

Laws 2005, c. 2, § 59, eff. Feb. 2, 2005; Laws 2005, c. 91, § 2, eff. July 1, 2005; Laws 2007, c. 261, § 1, eff. April 30, 2007; Laws 2009, c. 214, § 2, eff. May 12, 2009.

Utah Code § 77-18-1

§ 77-18-1. Suspension of sentence--Pleas held in
abeyance--Probation--Supervision--Presentence
investigation--Standards--Confidentiality--Terms and conditions--Termination,
revocation, modification, or extension--Hearings--Electronic monitoring

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2)(a) On a plea of guilty, guilty with a mental illness, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

- (i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;
- (ii) on probation under the supervision of an agency of local government or with a private organization; or
- (iii) on court probation under the jurisdiction of the sentencing court.

(b)(i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(iv) Court probation may include an administrative level of services, including notification to the court of scheduled periodic reviews of the probationer's compliance with conditions.

(c) Supervised probation services provided by the department, an agency of local government, or a private organization shall specifically address the offender's risk of reoffending as identified by a validated risk and needs screening or assessment.

(3)(a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

- (i) the type of offense;
- (ii) the results of a risk and needs assessment;
- (iii) the demand for services;
- (iv) the availability of agency resources;
- (v) public safety; and
- (vi) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5)(a) Before the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include:

(i) a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family;

(ii) a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act;

(iii) findings from any screening and any assessment of the offender conducted under Section 77-18-1.1;

(iv) recommendations for treatment of the offender; and

(v) the number of days since the commission of the offense that the offender has spent in the custody of the jail and the number of days, if any, the offender was released to a supervised release or alternative incarceration program under Section 17-22-5.5.

(c) The contents of the presentence investigation report are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional 10 working days to resolve the alleged inaccuracies of the report with the department. If after 10 working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

- (i) pay, in one or several sums, any fine imposed at the time of being placed on probation;
- (ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;
- (iii) provide for the support of others for whose support the defendant is legally liable;
- (iv) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;
- (v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;
- (vi) serve a term of home confinement, which may include the use of electronic monitoring;
- (vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 76-6-107.1;
- (viii) pay for the costs of investigation, probation, and treatment services;
- (ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and
- (x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

- (i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or
- (ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:
 - (A) a diagnosed learning disability; or
 - (B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

- (a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and
- (b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10)(a)(i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, 12 months in cases of class B or C misdemeanors or infractions, or as allowed pursuant to Section 64-13-21 regarding earned credits.

(ii)(A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable. If the court retains jurisdiction for this limited purpose, the court may order the defendant to pay to the court the costs associated with continued probation under this Subsection (10).

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why the defendant's failure to pay should not be treated as contempt of court.

(b)(i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation is being requested by the department or will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11)(a)(i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(iii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation constitutes service of time toward a term of incarceration imposed as a result of the revocation of probation or a graduated sanction imposed under Section 63M-7-404.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12)(a)(i) Probation may be modified as is consistent with the graduated sanctions and incentives developed by the Utah Sentencing Commission under Section 63M-7-404, but the length of probation may not be extended, except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that

the conditions of probation have been violated.

(b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for the defendant's arrest or a copy of the affidavit and an order to show cause why the defendant's probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed if the defendant is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or reinstated for all or a portion of the original term of probation.

(iii) If a period of incarceration is imposed for a violation, the defendant shall be sentenced within the guidelines established by the Utah Sentencing Commission pursuant to Subsection 63M-7-404(4), unless the judge determines that:

(A) the defendant needs substance abuse or mental health treatment, as determined by a validated risk and needs screening and assessment, that warrants treatment services that are immediately available in the community; or

(B) the sentence previously imposed shall be executed.

(iv) If the defendant had, prior to the imposition of a term of incarceration or the execution of the previously imposed sentence under this Subsection (12), served time in jail as a condition of probation or due to a violation of probation under Subsection 77-18-1(12)(e)(iii), the time the probationer served in jail constitutes service of time toward the sentence previously imposed.

(13) The court may order the defendant to commit himself or herself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or the superintendent's designee has certified to the court

that:

- (a) the defendant is appropriate for and can benefit from treatment at the state hospital;
- (b) treatment space at the hospital is available for the defendant; and
- (c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports are classified protected in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63G-2-403 and 63G-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

- (a) ordered by the court pursuant to Subsection 63G-2-202(7);
- (b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;
- (c) requested by the Board of Pardons and Parole;
- (d) requested by the subject of the presentence investigation report or the subject's authorized representative; or
- (e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15)(a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

- (b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16)(a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

- (b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

- (i) the defendant to wear an electronic monitoring device at all times; and
- (ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

- (i) place the defendant on probation under the supervision of the Department of Corrections;
- (ii) order the department to place an electronic monitoring device on the defendant

and install electronic monitoring equipment in the residence of the defendant; and
(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

Credits

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp.Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003; Laws 2005, 1st Sp.Sess., c. 14, § 3, eff. July 1, 2005; Laws 2007, c. 218, § 3, eff. July 1, 2007; Laws 2008, c. 3, § 252, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2193, eff. May 5, 2008; Laws 2009, c. 81, § 3, eff. May 12, 2009; Laws 2011, c. 366, § 176, eff. May 10, 2011; Laws 2014, c. 120, § 3, eff. May 13, 2014; Laws 2014, c. 170, § 1, eff. May 13, 2014; Laws 2015, c. 412, § 205, eff. Oct. 1, 2015; Laws 2015, c. 413, § 1, eff. May 12, 2015; Laws 2016, 3rd Sp. Sess., c. 4, § 1, eff. July 17, 2016.